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105561—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 62

THE UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES RESNICK AND JOSEPH RESNICK, PARTNERS, TRADING AS L. RESNICK AND SONS

No. 63

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE ACME CAN COMPANY

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES IN REPLY TO BRIEFS FOR APPELLEES

I

The argument of the appellees that the opinion of March 11, 1936, was a final decision or judgment ignores the fact that it was not so regarded by the court and was not so entered by the clerk.

By the court it was denominated "Opinion sur demurrer" (R. 4). Like all opinions it forecast the judgment to be entered, but did not in form or substance constitute or resemble an appealable decision or judgment. The clerk did not enter it as a judgment but merely filed it as an opinion (R. 1, 4).

II

The Standard Container Act of 1928 in unequivocal and unambiguous terms prescribes nine standard sizes of hampers for fruits and vegetables, and forbids the manufacture or sale of all non-standard hampers of whatever size. As pointed out in the Government's brief in the *Resnick* case (pp. 23 *et seq.*) this clear intent is emphasized by the legislative history of the Act which forecloses the strained and unnatural construction contended for by the appellees.

III

In the District Court the appellees by demurrer assailed the constitutionality of the Standard Container Act of 1928 as beyond the power of Congress (Resnick, R. 4; Acme, R. 3). The court stated in its opinion that this ground of demurrer was not "stressed at the argument" (Resnick, R. 7), but that in any event it was without merit (Resnick, R. 7; Acme, R. 4). The appellees here attempt again to urge that because the Standard Container Act of 1928 is not confined to transactions in interstate and foreign commerce, it invades a field of legislation reserved to the several States.

This question, we believe, is not presented for review on this appeal, and in any event the contention urged is devoid of merit.

A. QUESTIONS DECIDED AGAINST DEFENDANTS ARE NOT WITHIN THE JURISDICTION CONFERRED BY THE CRIMINAL APPEALS ACT

The Criminal Appeals Act of March 2, 1907, provides for appeal "by and on behalf of the United States" from decisions holding an indictment bad, or arresting a judgment of conviction, because of the invalidity or construction of the statute upon which the indictment is founded, and also from decisions "sustaining a special plea in bar" when the defendant has not been placed in jeopardy.

Prior to the enactment of the Criminal Appeals Act the Government had no opportunity to obtain review of questions of law which were decided against it in the court of first instance. *United States* v. *Sanges,* 144 U. S. 310. The purpose of the Act was to remedy this situation, which often resulted in the inability to enforce a valid statute. The Act did not represent the judgment of Congress that the decisions specified were of such importance that immediate review by the Supreme Court was desirable, irrespective of which party obtained the decision below. Its sole purpose was to make appellate review possible "wherein the United States had been deprived of a remedy against wrongdoers." See House Rep. No. 2119, 59th Cong., 1st Sess. See *United States* v. *Bitty,* 208 U. S. 393, 400; *United States* v. *Stevenson,* 215

U. S. 190, 195–196. Accordingly, the jurisdiction of this Court is limited to an appeal "taken by and on behalf of the United States." See *United States* v. *Bitty, supra,* 399–400; *United States* v. *Heinze,* 218 U. S. 532, 545–546. It seems plain that the jurisdiction of this Court does not extend to questions decided in favor of the United States, which may be reviewed in the normal manner after conviction.

The Act confers a special and limited jurisdiction, and the Court may not examine the whole case when a question has been appealed under this Act. *United States* v. *Keitel,* 211 U. S. 370, 398–399; *United States* v. *Mason,* 213 U. S. 115, 122; *United States* v. *Mescall,* 215 U. S. 26, 31; *United States* v. *Kissel,* 218 U. S. 601, 606. It follows that the general rule, that any ground may be urged in support of the judgment below, *Langnes* v. *Green,* 282 U. S. 531, 537–538, is inapplicable to cases arising under this Act.

B. THE STANDARD CONTAINER ACT OF 1928 IS VALID AS A PROPER EXERCISE OF CONGRESSIONAL POWER

The Constitution (Article I, Section 8, Clause 3) provides that Congress shall have power "To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The argument that the power to fix a standard does not connote the power to prohibit non-standard weights and measures is rested on a too narrow

view of the law. This Court in a long line of well reasoned opinions has held that constitutional grants of power to Congress are to be liberally construed. Likewise, it is settled that a grant of power carries with it the power to do all things necessary or appropriate to carry out the granted power. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Legal Tender Cases,* 12 Wall. 457, 531 et seq.; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 336.

The power to fix a standard of weights and measures would indeed be an empty thing without the incidental and necessary power to compel observance of the standard prescribed.

The Standard Container Act of 1916 (U. S. C., Title 15, Sec. 251 *et seq.*) did, it is true, prescribe certain standards for containers for fruits and vegetables. For such containers, other than Climax baskets, it, however, permitted a wide deviation in size and shape and imposed the sole restriction that each container should be in capacity a multiple of the dry quart.

Twelve years of experience having demonstrated the benefits of even the limited standardization prescribed by the 1916 Act (Gov. Br., pp. 26 *et seq.*), Congress, by the Act of 1928, fixed new and more definite standards for certain measures or containers for fruits and vegetables. It fixed the bushel containing two thousand one hundred and fifty and forty-two hundredths cubic inches as the standard

for hampers, round stave baskets, and splint baskets for fruits and vegetables. It permitted certain fractional sizes of such measures or containers and provided for a two-bushel hamper as the maximum and a one-eighth bushel hamper as the minimum size permitted.

To more completely assure compliance with the standards fixed, the Act requires approval of specifications.

All these provisions, it is submitted, are appropriate to the exercise of the power to "fix a standard of weights and measures."

The contention that a container is not a measure and that Congress has no power to fix a standard for containers ignores the teachings of experience. Quart and pint bottles for milk are not only containers but commonly the only used and available measures of quantity. Boxes for apples, barrels for cranberries, hampers, baskets, and containers of various kinds, sizes, and dimensions have long been used as units of measurement. It is as futile to say that a two-quart hamper is not a measure of quantity as it is to argue that a one-quart measure is not a container.

The uniform course of the State decisions is persuasive that our contention is correct. See *McLean* v. *State,* 81 Ark. 304; *State* v. *Belle Springs Creamery Co.,* 83 Kan. 389; *People* v. *City of Rochester,* 45 Hun. (N. Y. Sup.) 102; *State* v. *Cooperative Store Co.,* 123 Tenn. 399; *City of Seattle* v.

Goldsmith, 73 Wash. 54; *State* v. *Peel Splint Coal Co.,* 36 W. Va. 802.

Respectfully submitted.

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NOVEMBER 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936